

UNITED STATES OF AMERICA,

No CR-98-0070 VRW

Plaintiff,

ORDER

v

HOWARD M VOGEL,

Defendant.

Defendant Howard M Vogel ("Vogel") was convicted by a jury on October 3, 2002, of one count of conspiracy to launder monetary instruments (18 USC § 1956(h)) and 14 counts of laundering funds by transferring them from outside to inside the United States (18 USC § 1956(a)(2)(B)(i)). Doc #314; Doc #360 at 1 ¶¶ 1, 2. On September 30, 2005, Vogel moved for a new trial and for discovery in support of his motion for a new trial. Doc #438. A hearing was held on this matter on November 8, 2005. For the reasons stated below, the court DENIES both motions.

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1 FRCrP 33 provides that a court may grant a new trial "if  
2 the interest of justice so requires." If the motion is based on  
3 newly discovered evidence, the motion must be filed within three  
4 years of the verdict or finding of guilt. FRCrP 33(b)(1). Because  
5 Vogel was convicted on October 3, 2002, the present motion is  
6 timely.

7 To prevail on an FRCrP 33 motion, a defendant generally  
8 must satisfy a five-part test: (1) the evidence must be newly  
9 discovered; (2) the failure to discover the evidence sooner must  
10 not be the result of a lack of diligence on the defendant's part;  
11 (3) the evidence must be material to the issues at trial; (4) the  
12 evidence must be neither cumulative nor merely impeaching and (5)  
13 the evidence must indicate that a new trial would probably result  
14 in acquittal. United States v Kulczyk, 931 F2d 542, 548 (9th Cir  
15 1991). But when the testimony of a prosecution witness is wholly  
16 discredited, a court should instead apply a relaxed standard and  
17 order a new trial. Mesarosh v United States, 352 US 1, 11-14  
18 (1956); United States v Chisum, 436 F2d 645, 648-49 (9th Cir 1971).

19 In his new trial motion, Vogel alleges that a key  
20 prosecution witness, Steven Ableman ("Ableman"), perjured himself  
21 at Vogel's trial, leading to an erroneous conviction. Doc #438 at  
22 1. After Vogel's conviction, Ableman pled guilty to obstructing  
23 justice based on false statements and submissions that he made and  
24 induced others to make to his probation officer about the source of  
25 some money that he had received. Vogel speculates that "[t]he  
26 false annotations Ableman put on the bank statements were for the  
27 purpose of hiding the true source of his tainted drug monies." Id  
28 at 2. Vogel also asserts that a new trial is justified because the

1 government misled defense counsel that all of Ableman's criminal  
2 conduct involving the false statements occurred after Vogel's  
3 trial. Id at 2-3.

4 Vogel's contentions do not justify a new trial because  
5 Vogel has neither justified invoking Mesarosh's relaxed test nor  
6 satisfied the standard five-part test. Vogel contends that  
7 Ableman's conviction necessarily means that Ableman lied at Vogel's  
8 trial when Ableman stated that he was complying with his plea  
9 agreement. Doc #438 at 1. But Ableman only made the false  
10 statements and submissions to his probation officer on November 25,  
11 2002, after Vogel had been convicted on October 3, 2002. Doc #440,  
12 Ex 3 at 2 ¶ 2. Because Ableman was not convicted based on actions  
13 that he took before or during Vogel's trial, Ableman did not  
14 necessarily commit perjury at Vogel's trial, and this conduct  
15 provides no basis "wholly [to] discredit" Ableman's testimony.  
16 Moreover, government misconduct does not justify granting a new  
17 trial here because the government's attorneys did not lie when they  
18 informed Vogel's counsel that Ableman was convicted based on  
19 activity that occurred solely after Vogel's conviction.

20 Nonetheless, Vogel speculates that Ableman committed  
21 other uncharged crimes by laundering money through sales of drug-  
22 tainted property. Doc #444 at 3-8. The government has refuted  
23 this assertion with evidence suggesting that Ableman legally  
24 obtained at least some of the money through a refund for  
25 commissions on the sale of Ableman's properties. Doc #443, Ex 1 at  
26 7 ¶ 2; id, Ex 3 at 10. But even if Ableman laundered this money,  
27 Vogel has not shown how this would discredit Ableman's testimony,  
28 which focused on other illegal actions that he and Vogel performed.

1 More importantly, all of the evidence that Vogel relies  
2 on would merely be cumulative and impeaching in a new trial.  
3 Ableman was impeached at Vogel's trial for previously committing  
4 dozens of serious crimes, including creating false documents to  
5 hide the source of money received in drug deals (Doc #408 at 388-  
6 98); destroying incriminating evidence when he believed that he was  
7 under investigation and that his house would be searched (id at  
8 405, 434-37); making false statements on tax returns (id at 422-  
9 25); lying under oath in previous suits (id at 430-31, 487-90);  
10 impersonating a lawyer so he could visit a co-defendant in custody  
11 (id at 433) and smuggling about \$1.5 million in drug proceeds out  
12 of the United States (id at 441-45). Hence, Ableman's past illegal  
13 conduct more than adequately demonstrated his dubious character,  
14 and evidence relating to Ableman's subsequent conviction would only  
15 be cumulative and likely would not change the outcome of a new  
16 trial.

17 The court also declines to exercise its discretionary and  
18 supervisory powers to order new discovery. Vogel has not shown  
19 that the requested documents pertaining to Ableman's conviction  
20 relate in any material way to Ableman's testimony at Vogel's trial.  
21 And, for the reasons discussed above, the requested discovery would  
22 be unlikely to lead to an acquittal in a new trial because the  
23 discovery would at best yield cumulative impeaching evidence.

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1           Accordingly, for the reasons stated above, the court  
2 DENIES Vogel's motion for a new trial and DENIES Vogel's motion for  
3 discovery in support of the new trial motion.

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5           IT IS SO ORDERED.

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8 VAUGHN R WALKER

9 United States District Chief Judge  
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